Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724
Attorneys for Respondents State Farm Mutual Automobile Insurance Company, et al.

October 8, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the decision by the National Highway Traffic Safety Administration to revoke the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary and capricious.

TABLE OF CONTENTS *

	Page
QUESTION PRESENTED	(i)
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
I. THE COURT OF APPEALS APPLIED THE TRADITIONAL STANDARD APPROPRIATE FOR REVIEW OF INFORMAL RULEMAKING: THE "ARBITRARY AND CAPRICIOUS" TEST	9
A. The Standard	9
B. The Standard as Applied	11
II. ON ANY STANDARD OF REVIEW, NHTSA'S DECISION WAS AN ABUSE OF DISCRETION AND SHOULD HAVE BEEN VACATED	16
A. It Was an Abuse of Discretion To Rescind Based on a New, Allegedly Ineffective Belt Design When Effective Belts Were Already in Service	16
B. It Was an Abuse of Discretion To Rescind Even a Standard Which Permitted the New Design	23
III. THE COURT OF APPEALS PROPERLY VACATED AND REMANDED THE RESCISSION, STAYING THE EFFECT OF THE UNDERLYING RULE FOR THE BENEFIT OF THE PETITIONERS HEREIN	24
CONCLUSION	27

* Pursuant to Rule 28.1, respondent State Farm states that it has no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates.

TABLE OF AUTHORITIES

Cases: Page

American Textile Manufacturers Institute v. *Donovan*, 452 U.S. 490 (1981) 16, 20
API v. *Knecht*, 609 F.2d 1306 (9th Cir. 1979) 13
Atchison, Topeka & Santa Fe Ry Co. v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973) 11, 14-15, 26
Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 12, 19
Chrysler Corp. v. *DOT*, 472 F.2d 659 (6th Cir. 1972) 3, 17, 26
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 9
Consumer Energy Council v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982) 25, 26
FCC v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) 10
First Girl, Inc. v. *Regional Manpower Administrator*, 499 F.2d 122 (7th Cir. 1974) 13
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 11
ILGW v. *Donovan*, No. 81-2606 (D.D.C., July 23, 1982) 15
Malrite T.V. of New York v. *FCC*, 652 F.2d 1140 (2d Cir. 1981) 15
Mobil Oil Corp. v. *FPC*, 417 U.S. 283 (1974) 8-9, 16, 26
NAACP v. *FCC*, No. 80-2416 (D.C. Cir., June 29, 1982) 15
National Tour Brokers Ass'n v. *ICC*, 671 F.2d 528 (1982) 15
NLRB v. *Weingarten*, 420 U.S. 251 (1975) 11
NRDC v. *EPA*, No. 81-2068 (3d Cir., July 8, 1982) 10, 11, 25
Pacific Legal Foundation v. *DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979) 4
Pillai v. *CAB*, 485 F.2d 1018 (D.C. Cir. 1973) 12
Power Reactor Co. v. *Electricians*, 367 U.S. 396 (1961) 11

TABLE OF AUTHORITIES—Continued

Page

Roadway Express, Inc. v. *NLRB*, 647 F.2d 415 (4th Cir. 1981) 11

State Farm v. *DOT*, 680 F.2d 206 (D.C. Cir. 1982) ..... *passim*

United States v. *Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) 12

United States v. *Rutherford*, 442 U.S. 544 (1979) 11

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 16

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1977) 12, 24, 25

Washington Ass'n for Television & Children v. *FCC*, 665 F.2d 1264 (D.C. Cir. 1981) 15

Statutes:

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1966) ..... *passim*

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.* 9, 10

All Writs Act, 28 U.S.C. § 1651 26

Legislative Materials:

S. Rep. No. 481, 95th Cong., 1st Sess. (1977) 4

S. Rep. No. 1301, 89th Cong., 2d Sess. (1966) 2, 16, 17

H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966) 17

Administrative Regulations and Materials:

46 Fed. Reg. 53,419 (Oct. 29, 1981) ..... *passim*

46 Fed. Reg. 21,172 (April 9, 1981) 6, 20

46 Fed. Reg. 12,033 (Feb. 12, 1981) 6

43 Fed. Reg. 52,493 (Nov. 13, 1978) 22

43 Fed. Reg. 21,912 (May 22, 1978) 22

42 Fed. Reg. 34,289 (July 5, 1977) 4

37 Fed. Reg. 3911 (Feb. 24, 1972) 3

34 Fed. Reg. 11,148 (July 2, 1969) 2

32 Fed. Reg. 2408 (Feb. 3, 1967) 2

DOT, The Secretary's Decision Concerning Crash Protection (Dec. 6, 1976) 3, 6

TABLE OF AUTHORITIES—Continued

Page

NHTSA Regulatory Analysis (October 1981).... 2, 4, 5, 17-18
NHTSA Regulatory Impact Analysis (April 1981) 7, 19
NHTSA Hearing Transcript (Aug. 5, 1981).....4, 21, 22
NHTSA Progress Report No. 3 (July 1980)..... 23
National Safety Belt Study (Sept. 4, 1981) (DOT Contract No. DTNH22-81-C-05224) 23-24
Comments of Professor William Nordhaus, NHTSA Docket No. 74-14 (May 26, 1981).....6, 18, 24
Comments of the Insurance Institute for Highway Safety, NHTSA Docket No. 74-14 (May 26, 1981) 22

Miscellaneous:

Chicago Sun Times, November 28, 1981 6
White House Press Office, "Actions to Help the U.S. Auto Industry" (April 6, 1981) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents State Farm Mutual Automobile Insurance Company, Kent Mason, Patricia Warren and Leorlin Boyd respectfully request the Court to deny the petitions for writs of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, in order "to reduce traffic accidents and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. One of Congress' principal concerns in passing the Safety Act was the " 'second collision'—the

impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc."—after the first collision between the automobile and another object. S. Rep. No. 1301, 89th Cong., 2d Sess. 3 (1966). Accordingly, one of the Department of Transportation's ("DOT") first actions in implementing the Act was the promulgation, in 1967, of Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all passenger cars. 32 Fed. Reg. 2408 (Feb. 3, 1967). By preventing or minimizing the impact of the "second collision," such devices substantially reduce the risk of death or serious injury in traffic accidents. NHTSA Reg. Analysis at IV-8 (October 1981) (JA 64).[1]

It soon became clear to DOT, however, that although the existing manual belts could drastically reduce deaths and injuries if used, "only a very low percentage of the motoring public" were fastening their belts. Therefore, the Department concluded, "the interests of motor vehicle safety demand the prompt installation of passive restraint systems"—*i.e.*, systems which do not require any affirmative action by the occupant (for example, buckling a belt) to be effective. 34 Fed. Reg. 11,148 (July 2, 1969). In 1969, DOT issued a notice of proposed rulemaking on the subject of passive restraints. *Id.* And in 1972, after three years of study, the Department issued a final amendment to Standard 208, requiring the installation of passive restraint systems in vehicles manufactured after August 15, 1975. In the interim period, from August 1973 until August 1975, manufacturers were permitted to install either passive restraints, or manual belts coupled with ignition interlocks which prevent the car from starting

---

[1] "JA" refers to the Joint Appendix filed by the parties in the court below. "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Motor Vehicle Manufacturers Association.

unless the belt is fastened. 37 Fed. Reg. 3911 (Feb. 24, 1972).

The automobile manufacturers immediately filed suit to challenge the rule, and in *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (1972), the Sixth Circuit upheld the passive restraint standard. However, because the court found that DOT had used an invalid "anthropomorphic test device" in setting performance specifications for restraint systems, the court stayed the effectiveness of the rule pending correction of the error. *Id.* at 681. In the meantime, the manufacturers had chosen to comply with Standard 208's interim requirements by installing ignition interlocks rather than passive restraints, and the public had become increasingly irritated at not being able to start their cars without fastening their belts. This led Congress to ban the interlock requirement. *See State Farm* v. *DOT*, 680 F.2d 206, 210 (D.C. Cir. 1982); 15 U.S.C. § 1410b(b)(1). Neither Congress nor the Sixth Circuit, however, rejected the passive restraint standard itself.

In 1976, DOT Secretary William Coleman again confirmed that passive restraints "are a reliable and effective means of substantially reducing deaths and injuries on the nation's highways." The Secretary's Decision Concerning Crash Protection 10 (Dec. 6, 1976) (JA 2068). However, he determined that the public needed more experience with passive restraints before making them mandatory. *Id.* at 6 (JA 2073). Accordingly, he launched a demonstration program, contemplating contracts with the automakers for the production of up to 250,000 passive-equipped vehicles per year. *Id.* at 8 (JA 2075).

In 1977, DOT again instituted a passive restraint rulemaking, and on July 5 issued a final, mandatory schedule for the installation of passive restraints. Giving the automakers over four years lead time, the final schedule required installation of passive restraints in large cars by September 1, 1981, in mid-size cars by September 1, 1982,

and in small cars by September 1, 1983. 42 Fed. Reg. 34,289. A judicial challenge was again filed, and the court (this time the D.C. Circuit) again upheld the passive restraint standard. *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Congress declined to exercise its legislative veto, and the Senate committee with jurisdiction over the National Highway Traffic Safety Administration ("NHTSA") affirmatively endorsed the standard. S. Rep. No. 481, 95th Cong., 1st Sess. (1977).

In the years since the first notice of rulemaking was issued in 1969, a wide variety of passive restraint systems have been installed in American automobiles and shown to work effectively. Between 1972 and 1976, approximately 10,000 GM vehicles were equipped with airbags, which are stored in the dashboard and inflate upon impact to protect the rider from collision with the car's interior. 42 Fed. Reg. at 34,290. Because these devices provide automatic protection and cannot be deactivated, they have "100%" usage rates. As the Department of Justice told the Court of Appeals in 1977, the fleetwide installation of airbags would save 9,000 lives and prevent 65,000 injuries per year. Brief for the Dept. of Justice, *Pacific Legal Foundation* v. *DOT* at 61.

Since 1975, automatic seat belts, which move into place automatically (without "buckling up") as the passenger enters the vehicle and closes the door, have been installed in over 350,000 Volkswagen Rabbits, and in 8,000 1978 and 1979 GM Chevettes. NHTSA Reg. Analysis at IV-29 (Oct. 1981) (JA 85); NHTSA Hearing Tr. at 82 (Aug. 5, 1981) (JA 2549). Approximately 13,000 1980 GM Chevettes were also equipped with automatic belts, 46 Fed. Reg. 53,419, 53,421 (Pet. App. 98a); NHTSA Hearing Tr. at 82 (JA 2549), as were 1980 Toyota Coronas (as an option) and 1981 Toyota Cressidas (as standard equipment) (JA at 1628). NHTSA has described all of these automatic belt designs as either practically or literally "nondetachable." 46 Fed. Reg. at 53,421 (Pet.

App. 98a).[2] In the case of the 1980 Chevettes and 1980-81 Toyotas, there is no "buckle" at all—egress may be obtained either by opening the door (which "opens" the belt) or, in an emergency, by a device which permits the occupant to "spool out" the belt and create the necessary slack.

Every study conducted by NHTSA of automatic belt systems already in service has revealed usage rates of at least 70%, which is approximately 40 percentage points above the rate of use of manual belts in the same models. 46 Fed. Reg. at 53,421 (Pet. App. 96a); NHTSA Reg. Analysis at IV-52 (JA 108). According to NHTSA's most recent estimates, these levels of increased belt usage could prevent some 7,000 additional fatalities and 130,000 additional injuries over the lifetime of the automobiles sold in each model year. NHTSA Reg. Analysis at IV-61, 62 (JA 117, 118).

Thus, on the eve of the deadline for commencing the mandatory installation of passive restraints—September 1, 1981—a wide variety of restraint technologies had already been utilized by the automakers and proven effective. Indeed, the manufacturers had already expended a substantial portion of the capital investment necessary to meet the deadline. 680 F.2d at 213. Moreover, every Secretary of Transportation since 1969 had agreed that installation of such devices would save countless lives. Yet in February 1981—barely three weeks into a new Administration—DOT Secretary Lewis set in motion the administrative process that would ultimately lead to abandonment of the government's longstanding commitment to passive restraints.

---

[2] The terms "detachable" and "nondetachable" as used by NHTSA are somewhat misleading, since most passive restraint systems now in use have some detachable feature. The VW Rabbit system is detachable but guarded by a starter interlock. GM's Chevette system can also be partially detached.

The effort began with a proposal to postpone the implementation date by one year. The express justification was the economic "difficulties of the automobile industry and some of its members." 46 Fed. Reg. 12,033 (Feb. 12, 1981). Two months later, the agency adopted the delay proposal, again stressing the "economic situation of the industry." 46 Fed. Reg. 21,172, 21,174 (April 9, 1981). The same day, NHTSA proposed the rescission of the entire Standard. 46 Fed. Reg. 21,205 (April 9, 1981). Both decisions were announced by the White House Press Office as part of a larger package of "Actions to Help the U.S. Auto Industry," at A-34 (April 6, 1981) (JA 1281, 1321).

The rescission proposal attracted numerous public comments, including three cost-benefit analyses performed by professional economists (JA 511, 606, 714). All three confirmed that the benefits of the Standard far exceeded its costs, precisely the same conclusion that NHTSA itself had reached prior to the 1981 rulemaking. *See, e.g.*, Coleman Decision, *supra* at 49 (JA 2116) (3.5 benefit/cost ratio for passive belts). Indeed, Professor William Nordhaus of Yale University concluded that implementation of the Standard would ultimately save thousands of lives and prevent tens of thousands of injuries per year, and would produce net economic benefits to society of $2.4 billion per year and $33 billion cumulatively over time. Nordhaus Comment at 1 (May 1981) (JA 511).

Notwithstanding these findings, the new NHTSA Administrator rescinded the rule on October 29, 46 Fed. Reg. 53,419—against the unanimous opposition of his own senior staff, *see* 680 F.2d at 240 n.44; *Chicago Sun Times*, November 28, 1981 at 21. This time, however, the asserted justification was neither the economic state of the auto industry, nor—perhaps due to the economists' calculations—an unfavorable cost-benefit analysis. Rather, the rescission was now premised almost entirely on the fact that some manufacturers had threatened to meet the

Standard by using an entirely new, so-called "detachable" automatic belt. Unlike any passive restraint device in use prior to 1981, NHTSA suggested, the new design permitted the occupant to separate or "detach" the system with such relative ease as to apparently invite disuse. Although six months before the agency had described these devices as "poorly designed," NHTSA Reg. Impact Analysis at V-24 (April 1981), NHTSA now cited this development as the basis for rejecting its prior studies of automatic belt systems as irrelevant. 46 Fed. Reg. at 53,420-21 (Pet. App. 92a, 97a). Instead of adopting the obvious suggestion pressed in the rulemaking—that NHTSA bar the new, easily detachable belt as a means of complying with the Standard—the agency simply completed the course set in motion in February 1981, and abandoned the Standard altogether.

The respondents in the present action—joined as amici curiae by the American College of Preventive Medicine, the Epilepsy Foundation and the United Auto Workers, among others—petitioned for review in the District of Columbia Circuit. Reviewing the entire 12-year rulemaking record, the Court of Appeals found the agency's decision to revoke the Standard "a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate." 680 F.2d at 208-09. The only explanation the court could find for the agency's action was that its "analysis . . . has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is." 680 F.2d at 240. As Judge Edwards said in concurrence, "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand." *Id.* at 242. Accordingly, the court vacated the rescission and remanded the matter to the agency. Pet. App. 161a.

REASONS FOR DENYING THE WRIT

In order to attract this Court's attention, petitioners have attempted to portray the court below as having applied an inappropriate standard of review to the agency actions at issue in this case. The facts, however, are to the contrary. As the Court of Appeals expressly stated, it applied the traditional standard for review of informal rulemaking: "the familiar 'arbitrary and capricious' test." 680 F.2d at 218. Moreover, as the court also noted, NHTSA's action in this case would have failed to survive under "*any* measure of reasoned decisionmaking," however narrow. *Id.* at 239 (emphasis added).

Regardless of how many times petitioners may choose to repeat the word, this is *not* a case about agency decisionmaking under conditions of "uncertainty." Rather, the results of NHTSA's own studies of technology *already in use* clearly demonstrate that the agency's rescission will lead to thousands of otherwise preventable traffic fatalities and tens of thousands of additional injuries each year. Rescission will also impose *net* economic costs on society of approximately $2.4 billion per year. And it will not appreciably help the automakers, who would have been able to shift most of the costs of passive restraints—which amount to approximately $89 per car—to the ultimate beneficiaries of improved safety, the purchasers of automobiles. Indeed, the evidence in favor of the passive restraints rule was so strong that NHTSA's entire senior staff opposed rescission.

The question presented here is not what standard of review a court should *theoretically* apply to agency decisionmaking, but rather whether the action taken by *this* agency in *this* case was arbitrary and capricious. On the basis of the entire 12-year rulemaking record, the court below found that it was. And, as this Court has stated on numerous occasions, that kind of fact-based determination is one "which Congress has placed in the keeping of the Courts of Appeals," and to which this Court will normally defer. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283,

310 (1974). It plainly is not the kind of issue worthy of certiorari—particularly not when granting the writ could well lead to yet another delay in preventing needless injury and death.

I. THE COURT OF APPEALS APPLIED THE TRADITIONAL STANDARD APPROPRIATE FOR REVIEW OF INFORMAL RULEMAKING: THE "ARBITRARY AND CAPRICIOUS" TEST

A. The Standard

The standard of review appropriate for the informal rulemaking conducted by NHTSA in this case is well-recognized. The Safety Act expressly provides that both the procedural and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; 5 U.S.C. §§ 701 *et seq.*, "shall apply to all orders establishing, amending, *or revoking* a Federal motor vehicle safety standard," 15 U.S.C. § 1392(b) (emphasis added). Therefore, "agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414 (1971), *citing* 5 U.S.C. § 706(2)(A).

That is precisely the standard of review that the court below applied in this case. No less than eight times the court either explained that "the familiar, 'arbitrary and capricious' test" applied, 680 F.2d at 218, or used those express terms to analyze NHTSA's actions. *See, e.g.*, 680 F.2d at 208, 218, 229, 230, 233, 236, 239, 240. Moreover, the court was clearly aware of the limited role it played under that test. As it explained, application of that test

> "does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgments and expertise of the agency. By no means may we substitute the court's judgment, or fail to 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" 680 F.2d at 229.

Contrary to the disingenuous assertion of the Motor Vehicle Manufacturers Association ("MVMA"), the court did *not* state that it was applying an "unusual" expansion of the arbitrary and capricious standard. MVMA Pet. at 12.[3] Although the court found the scope of review "a question of some complexity," 680 F.2d at 218, that complexity was engendered by MVMA's surprising suggestion that NHTSA's revocation of its final passive restraints rule was "substantially the same" as an agency's refusal to promulgate a rule in the first place—and thus was "close to the borderline of nonreviewability." MVMA Brief at 18 (February 1, 1982). The Court of Appeals correctly rejected MVMA's theory for three reasons.

First, the Safety Act expressly equates an order "revoking" a safety standard with one "establishing" such a standard for purposes of rulemaking procedure and judicial review. 15 U.S.C. § 1392(b). *Accord*, 5 U.S.C. § 551(5) (Administrative Procedure Act). Because a revocation order is a "rule" which may not be issued without rulemaking procedures, *see NRDC* v. *EPA*, No. 81-2068 at ¶ 25 (3d Cir., July 8, 1982), the "arbitrary and capricious" standard applies, *see generally FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803 (1978).

Second, as the Court of Appeals pointed out, a revocation is substantially different than a mere failure to act, because revocation constitutes a *reversal* of the agency's former views as to what course is both in the public interest and consistent with the intent of Congress. Indeed, in this case revocation was a reversal both of NHTSA's 12-year affirmation of the efficacy of passive

---

[3] What the court said, was that it "may seem unusual to discuss [the] legislative history before" discussing the standard of review—not that the standard it adopted was itself "unusual." 680 F.2d at 222. As explained *infra*, that unusual order of discussion was necessitated by MVMA's assertion that a test *even narrower* than "arbitrary and capricious" was appropriate for this case.

restraints, and of the implementation order in effect since 1977. As the court noted, a long line of opinions call for "judicial vigilance" in such circumstances to insure that "an agency changing its course . . . suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ." 680 F.2d at 220, *quoting Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971). *See Atchison, Topeka & Santa Fe Ry Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973); *NLRB* v. *Weingarten*, 420 U.S. 251, 268 (1975) (Burger, C.J., dissenting); *NRDC* v. *EPA*, No. 81-2068 at ¶¶ 21-22 (3d Cir. 1982). These considerations are simply inapplicable to cases of agency inaction.

Finally, as the Court of Appeals also explained, this case involves not just any reversal, but rather the reversal of a long-standing agency rule that had been repeatedly brought to Congress' attention and never changed by it. As both this Court and the courts of appeals have held, that kind of history is useful in determining which course is most consistent with the will of the legislature. *See United States* v. *Rutherford*, 442 U.S. 544, 553, 554 & n.10 (1979); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 413-14 (1961); *Roadway Express* v. *NLRB*, 647 F.2d 415, 419-20 (4th Cir. 1981). While the court recognized that such history neither "carries the weight of positive law" nor "mean[s] that NHTSA may not revoke the standard," the court rightly concluded that it justifies treating the revocation as something quite different than a mere refusal to act. 680 F.2d at 228, 229.

B. The Standard as Applied

As discussed in detail in part II *infra*, the Court of Appeals found NHTSA's revocation arbitrary and capricious for two independent reasons: the agency failed to consider obvious alternatives to revocation, and the

agency lacked any support in the record for its final decision to revoke the rule. 680 F.2d at 230. Petitioners have professed doubts as to the significance of both of these failings. Such doubts are plainly unwarranted.

As already noted, NHTSA's principal reason for revoking the Standard was its lack of faith in the efficacy of the new detachable belts which the automakers had threatened to install if forced to comply with the rule. However, as the Court of Appeals found, NHTSA did not "devot[e] even a modicum of reasoned analysis to several far more obvious possible" alternatives to rescission, including amending the Standard to eliminate compliance by these kinds of belts. 680 F.2d at 233. Quoting Judge Wilkey's 1973 opinion in *Pillai* v. *CAB*, 485 F.2d 1018, 1027 (D.C. Cir.), the court below found that kind of "artificial narrowing of options" to be "arbitrary and capricious." 485 F.2d at 1027; 680 F.2d at 233.

As Judge Wilkey explained in *Pillai*, an agency's failure to "rationally choose among the possible alternatives" may be viewed "as either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." 485 F.2d at 1029, 1030. *See United States* v. *Nova Scotia Food Products Corp.*, 56[illegible] F.2d 240, 253 (2d Cir. 1977). This Court reached the same conclusion in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 165-69 (1962), where it set aside an ICC order because the agency failed to state a rational basis for its choice of one action when another alternative was also available. "The agency," said Justice White, "must 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Id.* at 168.

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1977), relied upon by petitioners, is not to the contrary. That case did not hold that an agency need not consider alternatives to its chosen regulatory policies. U.S. Pet. at 26; MVMA Pet. at 22 & n.41. Rather, the Court held that an agency "cannot be found wanting

simply because the agency failed to include *every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . .*" *Id.* at 551 (emphasis added). That is hardly the situation here. As the Court of Appeals explained, NHTSA's error was not a failure to consider "uncommon or unknown" alternatives, but rather its failure "to consider or analyze *obvious* alternatives to rescission." 680 F.2d at 230 (emphasis added). Since both nondetachable belts and airbags had already been effectively used in thousands of automobiles, and indeed were the very devices that—until the last minute—everyone had expected the automakers to use, there could not have been any more obvious alternatives available for consideration by the agency.

The second, wholly independent ground for the Court of Appeals' decision, was the absence of even "one iota of evidence to support NHTSA's conclusion that [the passive restraints] Standard as written will fail to . . . lead to safety benefits that exceed [its] relatively small marginal costs." 680 F.2d at 231. It can hardly be doubted that such a complete lack of record support renders an agency action "irrational" and hence "arbitrary and capricious." *First Girl, Inc.* v. *Regional Manpower Administrator*, 499 F.2d 122, 124 (7th Cir. 1974); *API* v. *Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979), *aff'g* 456 F. Supp. 889, 905 (C.D. Cal. 1978). Because petitioners cannot dispute that point, they have instead attempted to characterize the Court of Appeals' opinion as having reversed the "burden of proof" by forcing the agency to prove the ineffectiveness of the Standard. PLF Pet. at 8.

There was no such shifting of the burden in this case. Indeed, the court below recognized that it "must defer to the policy judgments and expertise of the agency." 680 F.2d at 229. Although the court did state that "NHTSA has some burden . . . to show that a regulation once considered to prevent death and injuries efficiently

can no longer be expected to do so," *id.* at 231, in context it is plain that it did not mean to shift any technical "burden" by the use of that phraseology.

The question before the court was whether even a standard which permitted compliance by detachable belts would lead to substantially increased belt usage (and hence protection from injury). Already on the record were three key facts: (1) every previous study of every kind of passive restraint already in use had shown substantial safety benefits; (2) attitude surveys conducted by NHTSA itself suggested that these same results would be applicable to detachable belts; and (3) the agency's long-standing view had been that the Standard would be effective. 680 F.2d at 231. It was in that context, and in the light of that evidence already weighing heavily against NHTSA's decision, that the court quite reasonably expected NHTSA to come forward with some evidence in support of its decision. Such evidence, the court took pains to note, did not have to consist of "statistical data"; "logical argument" would suffice instead. But, said the court, there "must be *some* reason to support *any* reasoned decision." 680 F.2d at 231 (emphasis in original).

Thus, viewed in the context of an agency's decision to reject its former conclusions, despite the record evidence which still supported those conclusions, the court's language requiring some evidence or argument on the other side can hardly be read as a shift in the burden of proof. Indeed, this Court used remarkably similar language in dealing with another agency's reversal of course. In *Atchison, Topeka & Santa Fe Ry Co.*, an opinion much-cited by the petitioners, this Court explained:

> "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a *presumption* that those policies will be carried out best if the settled rule is adhered to. *From this presumption flows the*

agency's duty to explain its departure from prior norms." 412 U.S. at 807-08 (emphasis added).

Surely neither this Court's use of the words "presumption" and "duty," nor the Court of Appeals' use of the word "burden," were intended to reverse any technical "presumptions" or "burdens of proof" applicable to judicial review of agency action.

* * * *

The MVMA has contended that the opinion below will make it more difficult to deregulate an area of commerce than to regulate it in the first place. MVMA Pet. 17-25. As the foregoing analysis reveals, nothing could be further from the truth. The Court of Appeals applied precisely *the same* test to an agency's decision to deregulate as it would have applied to an agency's decision to regulate: the "arbitrary and capricious" test. No preference for one over the other was shown.[4] Subsequent District of Columbia cases citing the opinion below, including one decided by a member of the same panel, make that clear. *See NAACP* v. *FCC*, No. 80-2416 (D.C. Cir., June 29, 1982); *ILGW* v. *Donovan*, No. 81-2606 (D.D.C., July 23, 1982). Indeed, in *ILGW* v. *Donovan*, the court expressly stated that "in the recent case of *State Farm* v. *DOT* . . . the rescission of the passive restraint regulation was held to be subject to the same standard of review as was the regulation's original promulgation . . . the arbitrary and capricious standard . . . ." Slip op. at 8. That was also the law prior to the decision below, both in the D.C. Circuit, *see National Tour Brokers Ass'n* v. *ICC*, 671 F.2d 528, 532 (1982), and in other circuits, *see, e.g., Malrite T.V. of New York* v. *FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981).

---

[4] Indeed, members of the panel which unanimously vacated NHTSA's attempt at "deregulation" in this case, have shown themselves quite willing to affirm agency deregulation when it is not arbitrary and capricious. *E.g., NAACP* v. *FCC*, No. 80-2416 (June 29, 1982); *Washington Ass'n for Television & Children* v. *FCC*, 665 F.2d 1264 (1981).

The question presented in this case is not—as the petitioners would have it—whether regulation or deregulation is a more blessed state of being. The real question is whether, on the specific facts of this case, NHTSA's cancellation of its passive restraint rule was a rational exercise of the agency's discretion. As this Court has often repeated, that kind of fact-based inquiry is one which "Congress has placed in the keeping of the Courts of Appeals," and in which "[t]his Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 310. *See American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). As the following analysis of the facts actually before the Court of Appeals makes manifest, this is not that kind of case.

II. ON ANY STANDARD OF REVIEW, NHTSA'S DECISION WAS AN ABUSE OF DISCRETION AND SHOULD HAVE BEEN VACATED

Although the Court of Appeals took pains to specify the appropriate standard of review for this case, after examining the factual record, it found NHTSA's analysis so poor that it would have failed "any measure of reasoned decisionmaking." 680 F.2d at 239. The court found that to be so for two wholly independent reasons.

A. It Was an Abuse of Discretion To Rescind Based on a New, Allegedly Ineffective Belt Design When Effective Belts Were Already in Service

As its legislative history makes abundantly clear, the Safety Act was enacted out of Congress' belief that the automakers' voluntary efforts to improve automobile safety had "largely failed." "The only course commensurate with the highway death and injury toll," said the Senate Committee on Commerce, was the "unconditional imposition of mandatory standards at the earliest possible date." S. Rep. No. 1301, *supra* at 4. Accordingly, the

Act directs that the Secretary of Transportation "shall" establish mandatory Motor Vehicle Safety Standards. 15 U.S.C. § 1392(a).

"[S]afety," said the Congress, was to "be the overriding consideration in the issuance of [the] standards." S. Rep. No. 1301 at 6. *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Those standards were to be performance standards, concentrating not on the design of a particular safety device, but rather on the required minimum level of safety improvement it must attain. S. Rep. No. 1301 at 6. Moreover, because Congress had become disenchanted with the voluntary efforts of the automakers, it intended the standards to be "technology forcing." That is, they were to go beyond existing technology and were "to impel automobile manufacturers to develop and apply new technolog[y] to the task of improving the safety design of automobiles as readily as possible." *Chrysler Corp. v. DOT*, 472 F.2d 659, 671-72 (6th Cir. 1972). *See* S. Rep. No. 1301 at 1, 10. As the Department of Justice explained to the Sixth Circuit, an "important reason for passage of the [Safety] Act was to insure that the pace of safety measures would *not* be left to industry." Brief for the Department of Justice, *Chrysler Corp.* v. *DOT* at 62 (emphasis in original).

But in this case, it was not even necessary to compel the development of new technology: passive restraint devices already in service in thousands of cars had been shown to be effective in NHTSA's own studies. By the agency's analysis, if installation of a restraint device could increase usage by just 13 percentage points over current manual belt use, the standard's benefits would outweigh its costs. NHTSA Reg. Analysis at A-10 (Oct. 1981) (JA 284); 680 F.2d at 215. Yet, NHTSA's surveys of automatic belt systems already installed in thousands of GM and VW automobiles revealed that these devices increased belt use by over 40 percentage points, roughly three times the break-even level. 46 Fed. Reg. at 53,421 (Pet. App. 96a); NHTSA Reg. Analysis

at IV-52 (JA 108). The agency calculated that increases of this magnitude would prevent approximately 7,000 deaths and 130,000 injuries each year, as compared to the results if the present manual belts were left in place. NHTSA Reg. Analysis at IV-61, 62 (JA 117, 118). And Professor Nordhaus calculated that the *net* economic benefits to society would be $2.4 billion per year and $33 billion over time. Nordhaus Comment at 1 (May 1981) (JA 511). Moreover, virtually all of the costs of automatic belts—about $89 per car—could be passed on by the automakers to the beneficiaries of improved safety, *i.e.*, the purchasers of automobiles. NHTSA Reg. Analysis at VI-25 (JA 187). They, in turn, could more than make up that cost through reductions in automobile insurance. 680 F.2d at 240 n.43; NHTSA Reg. Analysis at V-7, 9 (JA 155, 157).

Despite all of the evidence generated by NHTSA in favor of its passive restraint standard, Administrator Peck revoked the rule on October 29, 1981. The key rationale was a "drastic change" in the plans of the automakers: some had threatened to meet the standard by using an entirely new, "detachable" automatic belt.[5] "[U]nlike the automatic belts in Rabbits and Chevettes," NHTSA said, the new belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently."[6] Hence, "[i]nstead of being equipped with automatic restraints that will protect substantially greater numbers of persons

---

[5] Because the automatic belts already on the road had been proven cost-effective, it was this change in kinds of automatic belts, and not the shift from airbags to belts, that was important. *Compare* MVMA Pet. 6, 7. Nor was the public's switch from large to small cars of any import, since NHTSA is on record as believing that small car buyers are even more likely to accept and use automatic restraints than large car buyers. 46 Fed. Reg. at 53,421 (Pet. App. 98a). *Compare* MVMA Pet. 6 n.13.

[6] This assertion gave the Court of Appeals serious doubts as to whether the detachable belts complied with the passive restraints Standard at all. 680 F.2d at 234.

than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." 46 Fed. Reg. at 53,421, 53,420 (Pet. App. 97a, 92a). Although in April 1981 this very analysis had led the agency to characterize detachable belts as "poorly designed," NHTSA Reg. Impact Analysis at V-24 (April 1981) (JA 2548), in October it seized on the change as a reason for rejecting as irrelevant its prior tests on other designs. 46 Fed. Reg. at 53,421-22 (Pet. App. 97a-99a).

It is hardly surprising that the Court of Appeals found "the absurdity of this Orwellian reasoning obvious." 680 F.2d at 234. The agency had simply turned the Safety Act on its head. Instead of forcing the industry to develop new and *better* technology, it had surrendered to the automakers' threat to use technology *worse* than that already on the road. Instead of insisting on a performance standard requiring a certain level of safety results, it retreated before an eleventh hour industry decision to use a design which was worse than alternatives known to meet the performance criteria. Hence, this is not, as petitioners attempt to portray it, a case in which NHTSA exercised its discretion in a reasonable, if debatable, fashion. Here, the agency failed to exercise its discretion at all, *see Burlington Truck Lines*, 371 U.S. at 168, and instead transferred it wholesale to the very industry it was charged with regulating.

NHTSA had, of course, obvious alternatives to such capitulation. Chief among these was barring compliance by the new type of detachable belt, which would still have permitted compliance by a wide variety of other belt designs as well as airbags.[7] Yet, as the Court of

---

[7] Although the Solicitor General suggests that had NHTSA adopted that alternative, it "may have faced challenges from the manufacturers and others" on the ground that barring detachables was not proposed in the Notice of Proposed Rulemaking, the agency itself did *not* make that argument in support of its decision

Appeals discovered, NHTSA did not "devot[e] even a modicum of reasoned analysis" to this alternative, "summarily reject[ing]" it in three paragraphs. 680 F.2d at 233; 46 Fed. Reg. at 53,424 (Pet. App. 109a-110a). As the court noted, the agency's reasons can only be characterized as "hollow" and "capricious." 680 F.2d at 233, 234.

Before examining those reasons, however, the various petitioners' "statements of fact" require that some attention be paid to what the agency did *not* say. NHTSA did *not* say that even the "*non*detachable" belts now on the road would generate "uncertain" benefits, and that therefore there was no reason to insist on any passive restraint standard at all. Although the agency did note that there were "demographic" difficulties in extrapolating to other cars the large increases in usage shown in restraint-equipped Rabbits and Chevettes, in the end NHTSA conceded that "*most* of the increase in automatic belt [use] in Rabbits and Chevettes is due to the nondetachability feature" and that only 1/5 of the increase could be attributed to demographics. 46 Fed. Reg. at 53,422 (Pet. App. 102a). The remaining 4/5 was more than enough to make the nondetachable belts cost-effective. *See supra* p. 17. Hence, the theoretical arguments raised on appeal regarding the latitude which must be given agencies operating under conditions of uncertainty are simply irrelevant to the facts of this case. *Compare* U.S. Pet. 19.

---

to rescind. In fact, as discussed *infra* the agency actually *did* consider barring detachables, albeit summarily. As this Court has instructed, the Solicitor's *post hoc* rationalizations should be given no weight. *American Textile Mfrs. Inst.*, 452 U.S. at 539. Moreover, such challenges would have been clearly without merit. NHTSA's Notice of Proposed Rulemaking did in fact call for public comment to identify the "most effective and reasonable approach to addressing the safety problems posed by the low rate of safety belt use," 46 Fed. Reg. at 21,206 (JA 13), and its Final Notice acknowledges that several commentators complied by suggesting—on the public record—that detachable belts be barred. 46 Fed. Reg. at 53,424 (Pet. App. 109a).

The three reasons NHTSA did give for failing to bar the new detachable belts were indeed "capricious." First, it said that Congress' 1974 rejection of the interlock feature "suggests that Congress would look with some disfavor" on other use-compelling features, e.g., nondetachability. 46 Fed. Reg. at 53,424 (Pet. App. 109a). But, as the Court of Appeals' review of the legislative history makes clear, "[t]here is absolutely no evidence to support such a conclusion; indeed, every indication in the record points the other way." 680 F.2d at 234, 235.[8] Second, NHTSA reported that "[r]ecent attitudinal research" it had conducted indicated a "widespread, latent and *irrational* fear in many members of the public that they could be trapped by the seat belt after a crash," and the agency did not want to impose a technology that would "trigger" that fear. *Id.* (Pet. App. 110a) (emphasis added). However, as the court below discovered, the "research" cited for this proposition—which surveyed users of *manual belts* only—disclosed that *only 7%* of the respondents had cited this fear. 680 F.2d at 235 n.34, *citing* JA 1108.

Finally, NHTSA offered a third rationale, although it was unwilling to advance it except by implication. While it said it did not want to impose a requirement that would "complicate" emergency egress from a vehicle, the agency did not take the next step and say that nondetachable belts would in fact complicate egress. 46 Fed. Reg. at 53,424 (Pet. App. 110a). As the Court of Appeals noted, there is *no* evidence suggesting that emergency release from nondetachable belts is any more difficult than from detachable belts; in fact, the evidence is all to the contrary. 680 F.2d at 236. GM has twice stated emphatically that nondetachable belts with spool-out releases are as safe as detachable belts in terms of emergency egress,

---

[8] Although Congress could have banned passive restraints at the same time it banned interlocks, it took care not to do so. Moreover, what Congress objected to about interlocks—the fact that they require affirmative action in order to start the car—is simply not a problem with automatic belts. 680 F.2d at 235.

NHTSA Hearing Tr. at 95 (Aug. 5, 1981) (JA 1225-26); 43 Fed. Reg. 21,912, 21,914 (May 22, 1978) (JA 1724-25), and NHTSA itself has agreed, stating that it does "not believe that the use of [such] mechanisms will cause serious occupant egress problems. . . ." 43 Fed. Reg. 52,493, 52,494 (Nov. 13, 1978) (JA 1706).[9]

In short, by its decision in this case, NHTSA abandoned a 12-year commitment to auto safety because the industry it was instructed by Congress to regulate threatened to comply with such regulation by installing devices which constituted the "worst available technology." Moreover, the agency then rejected the obvious alternatives to abandonment on the basis of arguments lacking any support in the record. "Arbitrary" and "capricious" are, if anything, gentle words to apply to that kind of decision-making.

---

[9] Three other makeweight arguments against passive belts in general are also mentioned in the October Notice. First, NHTSA suggested that the public might regard automatic restraint requirements as "an expensive example of ineffective regulation," which might generate a public backlash against all mandatory safety measures. However, as the court pointed out, all the evidence indicated that passive restraints would be effective rather than ineffective. 680 F.2d at 236, 241.

NHTSA also suggested that a passive restraint requirement was "inequitable" because those who currently use their manual belts would have to pay for a system which affords them no additional protection. In fact, "even current users of manual belts" would benefit from such a requirement because "lower insurance premiums [for everyone] could follow implementation of the rule." *See* 680 F.2d at 240 n.43.

Finally, NHTSA signalled its intent to induce increased manual belt usage through a "public education" campaign. However, as NHTSA Administrator Peck himself pointed out, that was not viewed as a substitute for a passive restraint rule, NHTSA Hearing at 277 (JA 1247A), since if the program worked it could increase the already substantially higher usage rates for passive restraints as well. Unfortunately, there is absolutely no evidence that such public education efforts have ever succeeded in raising belt usage. Comments of the Insurance Institute for Highway Safety at A-1 (May 26, 1981) (JA 454).

B. It Was an Abuse of Disrcetion To Rescind Even a Standard Which Permitted the New Design

The foregoing analysis assumed that NHTSA was correct in concluding that a standard which permitted compliance by a detachable belt (if in fact Standard 208 did so, *see supra* note 6) would not effectively increase belt usage rates. However, as the court below found, there was "not one iota of evidence" supporting the conclusion that such a standard would be ineffective; in fact, all of the record evidence supported the opposite conclusion.

First, the record before the agency clearly established that, until the agency set in motion the revocation process, several manufacturers had already installed or were planning to install ahead of schedule automatic restraints of proven effectiveness: *i.e.*, GM, Toyota and VW (use-inducing automatic belts as described *supra*); Ford and Mercedes-Benz (air bags); and Saab and Nissan (automatic belts). *See* NHTSA Progress Report No. 3 at 56-57 (July 1980) (JA 1634-35). By reopening the passive restraint rulemaking on the eve of its scheduled implementation, the agency virtually invited the industry to backtrack. Even so, only two manufacturers explicitly stated an intention to use detachable belts. 680 F.2d at 215 & n.11. There is every reason to believe, therefore, that even if a standard permitting detachables were implemented, most manufacturers would respond by installing systems that even NHTSA agrees are effective—they would certainly have every incentive *not* to purposely implement ineffective designs.

Moreover, the record evidence indicates that even if the manufacturers did comply with detachable belts, usage rates would still increase significantly. First, *every* kind of automatic belt tested to date has achieved that result. *See supra* p. 5. Second, detachable belts share with those belts the feature which NHTSA's most recent study indicates is the key to enhancing use. According to the 1981 National Safety Belt Study, the two most important reasons why people do not wear manual seatbelts are:

(1) the belts take "too much time" to put on, and (2) occupants are "too lazy" or forgetful to buckle up. *Id.* at 7 (JA 1108). Like other automatic belts, detachables eliminate these problems, because they do not require the user to take affirmative action to have the benefit of crash protection. As long as they remain connected, detachable belts take no time or thought to put on (they automatically envelop the occupant). In fact, they require an affirmative act to disconnect and therefore, like other automatic belts, put "inertia" on the side of protection rather than against it. 680 F.2d at 231 n.28. Hence, there is every reason to believe, as Professor Nordhaus concluded, that even detachable belts would generate substantial belt usage. Nordhaus Comment at 7-9 (May 1981) (JA 517-19).

It was in the context of this record support for detachables that the Court of Appeals proceeded to search in vain for any evidence, either in the "form of statistical data or logical argument," which questioned the effectiveness of those belts. Finding "not one iota" of such evidence, the court rightly concluded that NHTSA had abused its discretion. 680 F.2d at 231.

III. THE COURT OF APPEALS PROPERLY VACATED AND REMANDED THE RESCISSION, STAYING THE EFFECT OF THE UNDERLYING RULE FOR THE BENEFIT OF THE PETITIONERS HEREIN

The petitioners' final argument is that after finding the agency's action unlawful, the court below disposed of the case in a manner inconsistent with this Court's decision in *Vermont Yankee*. In that case, the Court held that when an agency's action "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency]"—but the court should not otherwise intrude into the administrative process. 435 U.S. at 549. The fact is that the court below followed *Vermont Yankee*'s instructions to the letter.

The Court of Appeals' June 1982 order disposing of the case says no more than that the agency's decision "is vacated, and the cases are remanded to [NHTSA] for further proceedings consistent with the opinion . . . ." Pet. App. 161a. Moreover, as the court's opinion recognized, this disposition did not preclude NHTSA from making "a reasoned decision" that the passive restraint standard should be suspended or rescinded. 680 F.2d at 241, 242. Indeed, the court explicitly offered the agency another opportunity to "find" "nonarbitrary reasons for rescinding the standard." 680 F.2d at 242. NHTSA responded by proposing fact gathering "which would take one or more years to complete." Pet. App. 133a.

Faced with that show of obstinancy, the court announced that it would stick to the letter of *Vermont Yankee*, and do no more than vacate and remand the case—although it reiterated that the agency was still "free to issue orders rescinding or modifying the passive restraint standard, subject to judicial review." Pet. App. 82a (August 4, 1982). As the court noted, however, vacating NHTSA's decision to rescind its prior rule had the effect of returning the matter to the *status quo ante litem*: *i.e.*, the unrescinded prior rule remained in effect. Pet. App. 81a. That conclusion as to the effect of vacating an agency's attempted revocation of a rule is precisely the same one recently reached both by the Third Circuit in *NRDC* v. *EPA*, No. 81-2068 at ¶¶ 47, 49, and by Judge Wilkey in *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 479 (D.C. Cir. 1982).

But the prior rule would have required installation of passive belts by September 1, 1982, a deadline which, since it was now August of the same year, the court knew the automakers could not meet. Hence, *for what was clearly the benefit of the very parties petitioning before this Court*, the court below simply stayed the passive restraint rule for yet another year, once again telling the agency it was free at any time to take action aimed

at delaying the deadline even further, or at overturning it altogether. Pet. App. 81a-82a. It even gave NHTSA an opportunity to advise as to whether the court should issue a further stay because one year was insufficient. Pet. App. 81a.[10]

It cannot be doubted that the Court of Appeals, in the exercise of its equity powers, had the authority to issue that temporary stay. *See Atchison, Topeka & Santa Fe Ry Co.*, 412 U.S. at 819; *cf. Mobile Oil Corp.* v. *FPC*, 417 U.S. at 311. Indeed, as the MVMA points out, such a stay of the same safety standard was issued by the Sixth Circuit in the *Chrysler* case. MVMA Pet. 27 n.54; *see Chrysler Corp.*, 472 F.2d at 681. And Judge Wilkey recently issued just such a stay after holding FERC's attempted revocation of a rule invalid in *Consumer Energy Council*, 673 F.2d at 479. To be sure, the Secretary of DOT has the power under 15 U.S.C. § 1392(e) to delay the effective date of a safety standard, *see* U.S. Pet. at 27, but there is nothing in the Safety Act suggesting that this provision was intended to deprive the courts of their historic equity powers. *See* 28 U.S.C. § 1651 (All Writs Act). It is the height of presumptuousness for those who benefitted from the court's plainly appropriate action to now attempt to use it as a ground for seeking certiorari.

---

[10] On October 1, 1982, NHTSA told the court that the automakers could not install passive restraints until Model Year 1986 "at the earliest"—despite the fact that until Administrator Peck issued his first order in April of 1981, the manufacturers had been facing a compliance deadline of *September 1981*. The matter is presently pending in the Court of Appeals.

CONCLUSION

The petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724
Attorneys for Respondents
State Farm Mutual Automobile
Insurance Company, et al.

October 8, 1982

[THIS PAGE INTENTIONALLY LEFT BLANK]